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Covidien LP 60 Middletown Avenue c/o Legal - Mailstop MS 54 North Haven, CT 06473			OU, JING RUI	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOSHUA STOPEK, JACQUELINE JONES, and  
AMIN ELACHCHABI

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Appeal 2015-005258  
Application 12/486,352  
Technology Center 3700

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Before JOHN C. KERINS, FREDERICK C. LANEY, and  
ARTHUR M. PESLAK, *Administrative Patent Judges*.

PESLAK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Joshua Stopek et al. (“Appellants”) appeal under 35 U.S.C. § 134(a) from the Examiner’s decision rejecting claims 1–10, 15–17, and 40–42.<sup>1</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Appellants submit the real party in interest is Covidien, LP. Br. 2.

## THE CLAIMED SUBJECT MATTER

Appellants' invention "relates to a sheath for use with an anastomosis for prevention of fluid leaks." Spec. ¶ 2. Claim 1, reproduced below, is representative of the claimed subject matter.

1. A sheath for positioning within a body lumen adjacent an anastomosis, the sheath comprising:

    a sleeve defining a passage, the sleeve having a proximal portion and a distal portion;

    a first ring-shaped member extending from a first terminal end of the sheath toward the proximal portion of the sleeve; and

    a second ring-shaped member extending from the distal portion of the sleeve to a second terminal end of the sheath;

    each of the first and second ring-shaped members defining a funnel having a first diameter at a proximal end portion thereof and a second diameter at a distal end portion thereof, the first diameter of a respective one of the funnels being larger than the second diameter of the respective one of the funnels, wherein an inner surface of the funnel of the second ring-shaped member tapers radially inward from the distal portion of the sleeve to the second terminal end of the sheath;

    at least one of the first and second ring-shaped members being formed of a self-sealing material;

    the proximal portion of the sleeve being connected to the first ring-shaped member and the distal portion of the sleeve being connected to the second ring-shaped member such that the first ring-shaped member is configured to be positioned proximal of the anastomosis and the second ring-shaped member is configured to be positioned distal of the anastomosis.

## REJECTIONS

- 1) Claims 41 and 42 are rejected under 35 U.S.C. § 112, first paragraph for failing to comply with the written description requirement.
- 2) Claims 1, 2, 9, 10, 15, and 40–42 are rejected under 35 U.S.C. § 102(b) as anticipated by Seguin (US 2005/0043790 A1, published Feb. 24, 2005).
- 3) Claims 3–8 are rejected under 35 U.S.C. § 103(a) as unpatentable over Seguin and Osborne (US 2006/0235512 A1, published Oct. 19, 2006).
- 4) Claims 16 and 17 are rejected under U.S.C. § 103(a) as unpatentable over Seguin and Hojeibane (US 2003/0236568 A1, published Dec. 25, 2003).

## DISCUSSION

### *Rejection 1*

Claim 41, which depends indirectly from claim 1, recites “the first diameter of one of the funnels is larger than the first diameter of the other funnel” and claim 42 recites “the second diameter of one of the funnels is smaller than the second diameter of the other funnel.” Br. 16–17 (Claims App.). The Examiner determines that these claims do not comply with the written description requirement of 35 U.S.C. § 112, first paragraph, because of lack of textual support in Appellants’ original disclosure and Appellants’ drawings cannot be relied on for written description support because the Specification does not state that the drawings are to scale. Final Act. 3. Appellants contend that paragraphs 42 and 43 of the original Specification

and Appellants' Figure 1 provide sufficient written description for claims 41 and 42. Br. 7–8.

Although the Specification does not state that Appellants' drawings are to scale, a drawing, nevertheless, teaches all that it reasonably discloses and suggests to a person of ordinary skill in the art. *In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979). In this case, one of ordinary skill in the art, when viewing Appellants' Figure 1 in light of the written description, would reasonably understand that the first diameter of funnel 12 (noted as item 12a in Figure 1) is larger than the first diameter of funnel 16. We, therefore, do not sustain the rejection of claim 41 under 35 U.S.C. § 112, first paragraph.

With respect to claim 42, Appellants' Figure 1 illustrates that the second diameter of funnel 12 (item 12b) is of the same diameter as sleeve 14 in that area. It also appears from Figure 1 that sleeve 14 is generally of a constant diameter along its length. We note that there is no indication in the Specification that sleeve 14 is not of constant diameter nor is there any disclosure or suggestion of a reason why the sleeve would not be of constant diameter. The second diameter of funnel 16 (item 16a) is illustrated in Figure 1 as being smaller than the diameter of sleeve 14. We, therefore, determine that one of ordinary skill in the art would reasonably understand that the second diameter of funnel 16 (item 16a in Figure 1) is smaller than the second diameter of funnel 12 (item 12b in Figure 1). Based on the foregoing, we do not sustain the rejection of claim 42 under 35 U.S.C. § 112, first paragraph.

*Rejection 2*

Appellants argue claims 1, 2, 9, 10, 15, and 40–42 as a group. Br. 9–11. We select claim 1 as representative and claims 2, 9, 10, 15, and 40–42 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(iv).

The Examiner finds that Seguin discloses all the limitations of claim 1. Final Act. 4–6. The Examiner provides an annotated version of Seguin’s Figure 10 in support of the rejection. *Id.* at 6.

Appellants’ sole contention of error is that “Seguin’s sheath 3 does not taper radially inward to the terminal end of Seguin’s sheath 3. Rather, Seguin’s sheath 3 includes an inner surface that only tapers distally to a location proximal of the terminal end of the sheath.” Br. 10. In support of this contention, Appellants submit an annotated version of an enlarged portion of Seguin’s Fig. 10. *Id.* at 11. Appellants argue that, because Seguin’s sheath 3 is rounded at a very small length at its tip, the inner surface of sheath 3 curves outwardly near the tip of its terminal end. *Id.* In response, the Examiner maintains the rejection and notes that the claim language recites that the inner surface of the funnel tapers radially inward from the distal portion of the sleeve “to the second terminal end.” Ans. 3. For the following reasons, we sustain the rejection of claim 1.

Appellants’ Specification provides that “the second ring-shaped member 16 may be disposed at an angle  $\beta$  relative to the longitudinal axis ‘Y’ of the sleeve to help direct fluids towards distal opening 16a.” Spec. ¶ 43. Appellants’ Figure 1 illustrates that angle  $\beta$  is determined with respect to the inner surface of second ring-shaped member 16. *Id.* Fig. 1. The inner surface of second ring-shaped member 16, as shown and described by Appellants, tapers radially inward from distal portion 15 of sleeve 14 to the

second terminal end of sheath 10 (item 16a). *See id.* Fig. 1. Appellants have not directed us to any portion of the Specification indicating that the function of the radially inward taper to direct fluids toward the distal opening is affected by whether the terminal end at distal opening 16a is rounded or flat.

The radially inward taper of Seguin's sheath 3 can similarly be defined by the angle between the longitudinal centerline of the device shown in Seguin's Figure 10 and the inner surface of the second ring-shaped member shown in the Examiner's annotated version of Figure. 10. *See* Final Act. 6; Ans. 4. The Examiner's finding that the limitation "an inner surface of the funnel of the second ring-shaped member tapers radially inward from the distal portion of the sleeve to the second terminal end of the sheath" reads on Seguin's sheath 3 is, thus, supported by a preponderance of the evidence. As Appellants have not apprised us of error, we sustain the rejection of claim 1 as anticipated by Seguin. Claims 2, 9, 10, 15, and 40–42 fall with claim 1.

#### *Rejections 3 and 4*

Claims 3–8, 16, and 17 depend directly or indirectly from claim 1. Br. 14–16 (Claims App.). Appellants argue that these claims are patentable for the same reasons as claim 1. *Id.* at 12. We sustain the rejections of claims 3–8, 16, and 17 for the same reasons discussed above for claim 1.

#### DECISION

The Examiner's decision rejecting claims 41 and 42 under 35 U.S.C. § 112, first paragraph is reversed.

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The Examiner's decision rejecting claims 1–10, 15–17, and 40–42 under 35 U.S.C. § 102(b) and/or 35 U.S.C. § 103(a) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED